APPENDIX "A"

KENTUCKY REVISED STATUTES (KRS 81.120).

Annexation of another city by a first-class city. (1) Whenever a first-class city desires to annex all or any part of a city of the second, third, fourth, fifth or sixth class, the legislative body of the first-class city shall pass an ordinance designating the city proposed to be annexed, or defining accurately the part proposed to be annexed, declaring it to be desirable to annex the city or part, and providing that the question of whether or not the city or part shall be annexed shall be submitted to the qualified voters of the city to be annexed, or, if only part of the city is proposed to be annexed, to the qualified voters residing in that part, at the next regular election to be held therein, if the next regular election is not held within sixty days after the passage of the ordinance.

(2) The mayor of the first-class city shall deliver a certified copy of the ordinance to the county clerk, who shall, if it is proposed to annex the whole city, have printed on the ballots provided for use in the city proposed to be annexed, the question: "Are you in favor of being annexed to the City of .....?" Opposite that question shall be printed "Yes" and "No" with squares for stamping the cross mark to indicate preference. If it is proposed to annex only a part of the city, the clerk shall have the question printed on the ballots provided for use in each precinct embraced in whole or in part within that part of the city proposed to be annexed. If only a part of any precinct is embraced within that part of the city proposed to be annexed the clerk of the election shall mark an "X" with the black ink stencil in the squares opposite both the words "Yes" and "No" upon the ballots of all

persons voting who reside in the precinct but not in that part of it proposed to be annexed, before he delivers the ballots to those voters. The clerk shall cause the sheriff to deliver to the election officers in each precinct copies of the ordinance proposing to annex.

(3) If one-half or more of those voting on the proposition vote in favor of annexing, the city proposing to annex shall pass an ordinance declaring the smaller city or part annexed, and the smaller city or part shall then become a part of the annexing city.

(4) If less than one-half of those voting on the proposition vote in favor of annexing, the ordinance proposing annexation shall become ineffectual for any purpose.

APPENDIX "B"

(R. (1), page 785)

COURT OF APPEALS OF KENTUCKY

76878

CITY OF LOUISVILLE, - - - - - - - *Appellant,*

v.

EDWARD A. KRAFT, ET AL., - - - - - *Appellees.*

APPELLANT'S RESPONSE TO APPELLEES' PETITION FOR REHEARING.

May it please the Court:

I.

THE ISSUE.

In their petition for rehearing appellees again call the Court's attention to a pre-trial stipulation made by the parties on December 14, 1954. Appellees insist that this Court overlooked this stipulation in its opinion and argue that the provisions of the stipulation prohibit this Court from directing the trial court to enter judgment for the City of Louisville. Appellees contend that the issue presented by this petition for rehearing is whether the stipulation was binding and, if not, under what conditions the stipulation may be set aside. Presumably appellees charge (1) that the City of Louisville failed to abide by the stipulation agreement in making a motion for a directed verdict during the trial of this action, followed in due course by a

motion for judgment notwithstanding the verdict and by this appeal, and (2) that this Court unfairly and improperly refused to enforce the stipulation. Each of these assertions is utterly and completely false. Actually the issue presented, if it can be called an issue is the meaning of the stipulation.

For the convenience of the Court, we quote here the full text of the stipulation:

STIPULATION.

"By agreement between the attorney for the plaintiffs and the attorneys for the defendant in the above styled action, it is hereby stipulated as follows:

I.

"The attorney for the plaintiff, Wilbur Fields, represents a substantial number of the freeholders in the area proposed to be annexed to the City of Louisville by Ordinance No. 51 Series 1946.

II.

"It is stipulated that the plaintiffs, on the trial of this case, shall have the burden of proof on the whole case and that the Court shall instruct the jury with the appropriate instruction as provided by KRS 81.110(2) when less than 75% of the freeholders of the terrtiory to be annexed have remonstrated. Instructions to be given by the Court shall be as follows:

"(1) If the jury shall believe from the evidence that the addition of the territory described in Ordinance No. 51, Series 1946, will be for the City's interest and will cause no manifest injury to the persons owning real estate in the territory sought to be annexed, then they will find for the defendant, City of Louisville; but if the jury shall believe from the evidence that the addition of the territory described in the ordinance will not be for the City's interest or will cause manifest injury to the persons owning real estate in the territory sought to be annexed, then they shall find for the

plaintiff, but unless you shall so find, you shall find for the defendant, City of Louisville.

"(2) The term 'to the City's interest' means that annexation would contribute to its prosperity and would be generally advantageous to the City of Louisville, considering the situation and conditions from the standpoint of the whole—the City as an organized community and the suburban property as an unorganized community, and the over-all character of the property, its use and adaptability of bing absorbed into the City.

"(3) The term 'manifest injury' means the clear and obvious imposition of material or substantial burden upon the owners of the property as a class, or a majority of them.

"(4) Any nine, ten, eleven or twelve of your number may make a verdict either for the plaintiff or for the defendant. If nine or more and less than all of your number agree upon a verdict, each of you who agrees thereto shall sign it, if your verdict is unanimous, only your foreman, whom you yourselves will choose, shall sign it.

III.

"It is agreed that the defendant, City of Louisville, in the trial of this action will make no argument to the Court or the jury that the attorney for the plaintiff does not represent a substantial number of remonstrants because of their failure to appear and testify at the time of trial."

II.

FACTS.

It is true as set forth in the appellees' petition for rehearing that there were many pre-trial conferences on various motions and objections filed by both parties. At one of these pre-trial conferences, the proposal was made by Mr. Wilbur Fields, attorney for appellee-remonstrants, that he would stipulate that less than 75% of the free-

holders of the affected area had remonstrated against annexation if the City would do two things: (1) stipulate that he represented a substantial number of remonstrants, and (2) stipulate that if he should fail to produce a single remonstrant at the trial, no comment thereon would be made in argument to the jury by counsel for the City. He insisted on this latter point, in light of his experience in an earlier St. Matthews annexation trial, in which he had not produced a single remonstrant and considerable argument had been made on that point to the jury. Counsel for appellee-remonstrants then suggested that the instructions to be given by the court to the jury might also be included in this stipulation. Mr. Fields suggested that certain instructions had been used in the 1952 trial of the proposed annexation of the St. Matthews residential district, and that these same instructions might be used in the instant case. He suggested that since the City had the Transcript of Evidence of the 1952 trial available, those instructions might be stipulated. The City, through its attorneys, agreed to these proposals. When the stipulation was reduced to writing, embodying all the oral agreements by the parties, it was submitted to counsel for remonstrants for signature.

Mr. Fields signed the stipulation as submitted and raised no objection about the failure to include any express provision limiting the right of either side to make a motion for a directed verdict, a motion for a judgment notwithstanding the verdict, or the right of appeal. The stipulation, after being signed by the attorneys for both sides, was approved by the Court on December 15, 1954 (T. R., p. 58).

At no time, during the oral discussions between counsel, was any statement made either by counsel for the City or counsel for the remonstrants, that the rights of either party to make a motion for a directed verdict or a motion for a judgment notwithstanding the verdict, or to take an

appeal from the judgment of the trial court was affected by this stipulation.

III.

ARGUMENT.

A. The Stipulation Speaks for Itself.

Apparently the entire petition for rehearing is based on the major premise that the stipulation of December 14, 1954, committed both sides finally to the decision of the jury, and that thereby each side gave up its right thereafter to take the decision away from the jury by making a motion for a directed verdict, or a motion for judgment notwithstanding the verdict or to appeal from the jury's verdict.

Obviously, if this was not the agreement of the parties, the major premise set forth in appellees' petition for a rehearing has been destroyed, and their entire argument must fail.

With this in mind, a careful examination of the stipulation fails to reveal a single clause, binding the parties eternally to the jury's verdict. Certainly, there was no clause giving up the right to make a motion for a directed verdict, or a motion for judgment notwithstanding the verdict, or the right of appeal.

The plain language of the stipulation speaks for itself—there was no agreement in any fashion relating to the finality of the jury's verdict.

B. Corroborating Facts.

That the foregoing was the true agreement between the parties may be corroborated by the following facts:

1. Examination of the stipulation shows that in Section II thereof, there is provided, "It is stipulated that the plaintiffs, on the trial of this case, shall have the *burden of*

proof on the whole case * * *." (Emphasis ours.) The opinion of this Court in this action is based on the proposition that the remonstrants failed to meet the burden of proof. Under this stipulation, the plaintiff-remonstrants agreed to meet the burden of proof.

Certainly there would be no necessity for stipulating which side was to have the burden of proof, if the jury was to decide the entire case with no right of the Court to direct a verdict based on insufficiency of evidence of either party.

2. Counsel for the plaintiff-remonstrants apparently did not believe at the time of the trial that any stipulation or agreement existed which prevented the City of Louisville from making a motion for a directed verdict. No argument to this effect was made at that time. This is corroborated by the Transcript of Record, page 63, and by the affidavit of Mr. Fields appearing on pages 81 and 82 of the Transcript of Record. In the latter affidavit, Mr. Fields states under oath that no argument was made by him at that time on the motion of the City of Louisville for a directed verdict.

3. Mr. Fields, in his affidavit, which is a part of the record in this case (pages 81 and 82, T. R.), states that he, too, at the time of the trial, made a motion for a directed verdict for his clients, the plaintiffs-remonstrants. Obviously Mr. Fields did not believe at that time that it would be a breach of the stipulation to take the case away from the jury by a motion for a directed verdict if such motion would *win his case for him.*

An examination of the dates involved is very revealing. The stipulation was approved by the Court on December 15, 1954 (T. R., page 58). On March 3, 1955, the plaintiffs and the defendants each made a motion for a directed verdict (T. R., page 63). On April 12, 1955, the Notice of Appeal was filed in the Jefferson Circuit Clerk's office

(T. R., page 79). The affidavit of Mr. Fields, in which he admitted that he too had made a motion for a directed verdict at the trial of this case, was subscribed and sworn to by him on May 16, 1955 (T. R., page 82).

It is clear from these facts that the attorney for the plaintiff-remonstrants, at the time of the trial, and even after this appeal was filed in this Court, did not believe that the right of each party to make a motion for a directed verdict had been surrendered. Apparently, however, with the passage of time, and an adverse ruling by this Court, the stipulation has come to have a different meaning in the mind of Mr. Fields.

IV.

THE MEANING OF THE STIPULATION OF INSTRUCTIONS.

It is difficult indeed to understand the reasoning of the appellees that the stipulation of instructions to be given by the trial court precluded the trial court, or this Court on appeal, from deciding the case as a matter of law where, as here, the facts warranted such decision. The only fair, logical meaning which can be ascribed to any stipulation of instructions is that, with the approval of the Court, the stipulated instructions will be given to the jury if, and only if, the case should properly be submitted to the jury. To give any other meaning to such a stipulation and, thereby, to attempt to deprive any court of its right to decide a lawsuit as a matter of law, is presumptuous on the part of counsel so suggesting.

V.

MISCELLANEOUS.

In appellees' motion for oral argument on their petition for rehearing, they state that the pleadings in this case rested the burden of proof on the City of Louisville.

This statement is inaccurate. The petition of the remonstrants alleges that more than 75% of the resident freeholders of the territory remonstrated (T. R., page 3). This allegation was denied by the City's answer (T. R., page 16). Under this issue of fact, the burden of proof remained on the plaintiff-remonstrants and not on the defendant, City of Louisville. City of Louisville v. Brown, Ky., 119 S. W. 1196.

VI.

CONCLUSION.

The charge that the appellant, City of Louisville breached the stipulation approved December 15, 1954 is unfounded. There was no provision, express or implied, in the stipulation prohibiting either party from moving the trial court to take the case away from the jury.

The true agreement of the parties is corroborated by the contemporary conduct of both parties at the time of the trial, when each side attempted to take the case away from the jury by a motion for a directed verdict.

There being no merit to the sole contention in appellees' petition for rehearing it should be overruled forthwith.

Respectfully submitted,

S. M. Russell,
Director of Law,
Henri L. Mangeot,
Assistant City Attorney,
Herman E. Frick,
Assistant City Attorney,
Attorneys for Appellant.

APPENDIX "C"

(R. (2), pages 108-134)

COURT OF APPEALS OF KENTUCKY

77841

EDWARD A. KRAFT, ET AL., - - - - - *Appellants,*

v.

CITY OF LOUISVILLE, - - - - - - - *Appellee.*

APPEAL FROM JEFFERSON CIRCUIT COURT.

RESPONSE TO APPELLANTS' PETITION FOR REHEARING.

I.

STATEMENT OF FACTS.

For the convenience of the Court, we are setting out here the important mile-stones passed in this maze of litigation.

On April 24, 1946, the Board of Aldermen of the City of Louisville enacted Ordinance No. 51, Series 1946, proposing to annex to the City an area which, for convenience of reference, is now referred to as the "business district" of St. Matthews. Soon thereafter, a remonstrance suit (styled Kraft, et al. v. City of Louisville) was filed in the Jefferson Circuit Court pursuant to KRS 81.110. From time to time thereafter the remonstrants filed or attempted to file amended, substituted, supplemental and/or additional

pleadings in that action to assert certain additional "defenses to annexation" including all but one of the defenses upon which appellants now contend they have not had their day in court. All of these amended, substituted, supplemental and/or additional pleadings, insofar as pertinent here, were stricken or not permitted to be filed by the trial court. On March 3, 1955, a jury returned a verdict against the City of Louisville in the remonstrance action. On appeal by the City of Louisville, this Court held (City of Louisville v. Kraft, et al., Ky., 297 S. W. 2d 39) that the trial court should have directed a verdict in favor of the City of Louisville. Accordingly, the mandate issued on that appeal directed the trial court to sustain the motion of the City of Louisville for judgment notwithstanding the verdict and to enter judgment in favor of the City of Louisville (Supp. T. R., page 2).

Thereafter, remonstrants tendered to the trial court a "Special Supplemental Complaint" (Supp. T. R., pages 2-4) attempting to assert a defense based on the adverse vote on the "Mallon Plan" (KRS 81.300-81.360, which had occurred on November 6, 1956, while the appeal was pending before this Court before remonstrants filed a Petition for Rehearing) and further attempting to re-assert an issue previously rejected relating to the compilation of ordinances by the City of Louisville. In addition, remonstrants moved the trial court to order filed certain earlier pleadings (as a Substituted Amended Complaint), which had been stricken or tendered and rejected at various times prior to the trial. These pleadings sought to assert the alleged "defenses to annexation" relating to (1) the school bonds, (2) whether the streets within the business districts were included in the proposal ordinance, (3) the sewer bonds, (4) whether the area proposed for annexation was contiguous to the City of Louisville, and (5) whether an adverse judgment in a separate remonstrance suit on a

proposal by the City of Louisville to annex an entirely separate area barred annexation of the "business district" (Supp., T. R., pages 6-14).

Thereafter, on March 8, 1957, the trial court entered an order overruling the motions of remonstrants to file the pleadings hereinabove referred to (Supp. T. R., pages 24-25) and entered judgment in conformity with the opinion and mandate of this Court (Supp. T. R., pages 16-22). On this same date, remonstrants filed a motion for a new trial (Supp. T. R., pages 22-24), again asserting (for at least the third time) the matters mentioned above. This motion was overruled on March 11, 1957, whereupon remonstrants attempted unsuccessfully to supersede the judgment entered pursuant to the mandate of this Court.

On April 1, 1957, the Board of Aldermen enacted Ordinance No. 93, Series 1957, completing the annexation of the "business district".

Shortly thereafter, a declaration of rights suit was filed by the City of St. Matthews (which had annexed the business district in the meanwhile) against the City of Louisville. This action is now pending before this Court on a companion petition for rehearing (City of Louisville v. City of St. Matthews, S-66-57) filed by the City of St. Matthews seeking to set aside this Court's opinion that the St. Matthews suit constituted a collateral attack on the judgment entered in the original remonstrance action.

On July 11, 1958, this Court rendered its opinions in the second appeal of the remonstrance suit and the appeal in the St. Matthews declaration of rights suit, deciding each of the cases in favor of the City of Louisville.

Remonstrants then filed their petition for rehearing and a motion to recall the first mandate, apparently contending as their principal complaint that, after twelve and one-half years of litigation, they have not yet had their day in court.

II.

STATEMENT OF ISSUES.

The following is our conception of the issues which appellants-remonstrants seek to raise in their Petition for Rehearing:

A. Did this Court have jurisdiction of the appeal taken by the City of Louisville in City of Louisville v. Kraft, Ky., 297 S. W. 2d 39?

B. After entry of a judgment notwithstanding the verdict has been directed by this Court, may a litigant file amended pleadings reasserting issues previously decided by the trial court or asserting those which might have been presented for decision prior to the decision of this Court?

C. Does C. R. 50.03 authorize the filing of a motion for a new trial after this Court directs entry of a judgment notwithstanding the verdict?

D. May a court direct a verdict in an annexation remonstrance suit filed pursuant to KRS 81.110?

E. Is there any merit to the alleged "defenses to annexation" asserted and re-asserted in the Special Supplemental Complaint (Supp. T. R., pages 2-4) and Substituted Amended Complaint (Supp. T. R., pages 6-14) sought to be filed by remonstrants in the remonstrance suit after this Court issued its mandate in City of Louisville v. Kraft, et al., Ky., 297 S. W. 2d 39?

F. Have these remonstrants been denied equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States?

III.

ARGUMENT.

A. The Court of Appeals Had Jurisdiction of the Appeal Taken By the City of Louisville in the Case of City of Louisville v. Kraft, Ky., 297 S. W. 2d 39.

Appellants-remonstrants now raise for the first time a question as to whether this Court had jurisdiction of the appeal taken by the City of Louisville in the original remonstrance action. This same contention is advanced in their Motion to Recall Mandate filed with the Petition for Rehearing. Apparently, their argument is that the City of Louisville did not perfect its appeal because the judgment and pleadings did not show that the value of the amount or thing in controversy was at least $2,500.00. KRS 21.060-21.080.

In our brief filed in support of our Response to the Motion to Recall Mandate, we pointed out these salient facts (pages 2-6):

(a) KRS 81.110 (3) confers an unconditional right of appeal in annexation remonstrance suits "as in other cases".

(b) KRS 21.060 (1) confers an absolute right of appeal from final judgments in all civil cases (including annexation cases), subject to the exceptions contained in sub-sections (a), (b), (c) and (d) of that statute, of which (b), (c) and (d) can have no conceivable application here.

(c) KRS 21.060(1)(a) and KRS 21.080 limit the otherwise unconditional right of appeal in only those civil cases in which the value of the amount or thing in controversy is less than twenty-five hundred dollars.

(d) An annexation proposal and the remonstrance suit filed pursuant to KRS 81.110 involve the political

status and governmental organization of the area proposed to be annexed and *do not* involve an amount or thing in controversy which may be expressed in terms of money or, as this Court has stated it, is translatable into a monetary valuation.

In our brief on the Motion to Recall Mandate (at pages 4 and 5), we quoted the following language from the opinion of this Court in McLean v. Thurman, Ky., 273 S. W. 2d 825:

> "On their face the amendments to KRS 21.060 and 21.080, considered together with KRS 21.070 (which has been effective since 1914), appeared to make a monetary valuation of the matter involved in the controversy the criterion for determining: (1) if a party could take an appeal under any circumstances, and (2) if a party must file a motion for appeal in this court.
>
> The question is immediately presented as to whether or not a monetary valuation of the amount or thing, to the extent of $200, must be shown by the record in every kind of action before this court has jurisdiction of the appeal.
>
> (1) The principal purpose of the amendment seems to have been to place real property in the same category as personal property. The requirement of a monetary valuation would presuppose that the rights asserted reasonably could be asserted in those terms. It seems clear that in certain types of cases the thing in controversy may not be reducible to or translatable into a monetary valuation. For example, cases involving the custody of a child, certain contempt proceedings, actions in the nature of mandamus and prohibition, and others, have since time immemorial been appealable, though the rights involved could not be stated in monetary terms.
>
> The present action seeks a declaration of rights concerning the applicability of restrictions and covenants relating to real estate and also seeks to enjoin the defendants from using their property so as to im-

pair the rights of appellants. It is alleged that the plaintiffs have suffered and will suffer irreparable damage. From the very nature of the controversy it is obvious that the rights involved are distinct from the tangible property of appellants and appellees and that such rights cannot be measured in dollars and cents.

(2, 3) We do not think the legislature, in amending the statute, intended to deny appeals in those actions in which the amount or thing in controversy is not translatable into a monetary valuation and may be said to transcend such valuation. See 4 C.J.S., Appeal and Error, § 56. We therefore construe the statute as not requiring a jurisdictional amount to be shown by the record in a case of this nature".

We believe this construction of KRS 21.060 and KRS 21.080 governs in the instant case. See also Stone v. Stone, Ky., 275 S. W. 2d 910.

We pointed out further that this annexation case presents a question of great public interest involving the reciprocal duties and responsibilities of two cities and of the residents, property owners and business establishments of the area proposed to be annexed. We there called the attention of the Court to the rule that an appeal is granted as a matter of right in matters of great public interest where "the principle may be said to constitute the thing in controversy which is not translatable into a monetary valuation". Commonwealth of Kentucky v. Sandmann, Ky., 280 S. W. 2d 155.

It is obvious from the foregoing that this Court did have jurisdiction of the original appeal in this action and that the contention of remonstrants-appellants is without foundation.

B. After the Court of Appeals Directs Entry of a Judgment Notwithstanding the Verdict the Losing Litigant May Not File Amended Pleadings Asserting or Reasserting Issues Which Were or Could Have Been Raised in the Action.

The opinion of this Court now under attack refers to the attempt of appellants-remonstrants to file a Special Supplemental Complaint and an Amended Substituted Complaint seeking to invalidate the annexation proceedings on various grounds and to re-inject into the action several allegations which had been rejected by the trial court prior to the first appeal. This Court affirmed the action of the trial court in refusing to permit these pleadings to be filed, stating that the proceeding was terminated except for the entry of a judgment when this Court issued its mandate directing entry of judgment notwithstanding the verdict.

We believe this decision to be correct in all respects. It is clearly the function of this Court in directing entry of a judgment notwithstanding the verdict to make a final determination of litigation, merging in that judgment all matters relating thereto which were or could have been raised in the proceeding. We pointed out in our Memorandum Brief and our Supplemental Brief heretofore filed on submission of this case that all of the issues attempted to be advanced by remonstrants in the afore-mentioned Special Supplemental Complaint and Amended Substituted Complaint were or could have been raised in the original remonstrance proceeding and that remonstrants, if they really desired a decision by this Court on each of these points, should have taken a cross-appeal from the judgment entered after the trial of the action or; in the case of the Mallon Plan vote, should have called this to the Court's attention in their first Petition for Rehearing (see authorities cited in Memorandum brief of appellee, City of

Louisville, pages 5-8, and Supplemental Brief of Appellee, City of Louisville, pages 6-8).

As in the companion case of City of Louisville v. City of St. Matthews (S-66-57) now pending on appellee's Petition for Rehearing, opposing counsel criticize the use by this Court of Noel's Adm'x. v. Black's Adm'x.; 244 Ky. 655, 51 S. W. 2d 955, and Davis v. Davis, 182 Ky. 805, 208 S. W. 6, as authority for the proposition that after entry of judgment notwithstanding the verdict had been directed by this Court, remonstrants could challenge only the failure (which they do not do) of the trial court to enter judgment in conformity with the opinion and mandate of this Court. Remonstrants contend that these were equity cases which can have no application to this action. As we observed at pages 9 and 10 of our Response to St. Matthews' Petition for Rehearing (S- 66-57), this is an untenable position in view of CR 50.02 and CR 50.03 which now authorize entry of a specific judgment notwithstanding the verdict by the trial court or the Court of Appeals in cases formerly cognizable in law. This practice was not authorized prior to the adoption of the Rules of Civil Procedure. We further observed there (and now repeat) that the decisions mentioned in the opinion herein were obviously cited only to demonstrate that the effect of orders entered by this Court in *all* civil actions (CR 1; CR 2) pursuant to CR 50.02 and CR 50.03 is the same as that formerly restricted to equity cases.

Remonstrants argue that the opinion in the instant case is inconsistent on this point with the refusal of this Court to issue a rule against a Circuit Judge in the case of Engle v. City of Louisville, 312 Ky. 383, 227 S. W. 2d 407, to require entry of a judgment. The Court will note that the Engle case is not applicable here for two major reasons:

(1) This Court did not direct entry of a judgment notwithstanding the verdict in that suit;

(2) That case became moot prior to the return of that case to the Circuit Court because the ordinance proposing annexation was repealed, thus ending the litigation. City of Louisville v. Town of Crescent Hill, 21 K. L. R. 755, 52 S. W. 1054. It was for this reason that judgment was not entered.

Nor is the case of Engle v. City of Louisville, Ky., 262 S. W. 2d 371, of assistance to appellants-remonstrants. There this Court approved only the amendment and correction of a judgment which contained an erroneous description (that is, a description of an area different from that proposed to be annexed by the ordinance against which the remonstrance suit was filed).

C. CR 50.03(2) Does Not Authorize the Filing of a Motion For a New Trial After the Court of Appeals Directs Entry of a Judgment Notwithstanding the Verdict.

As did the City of St. Matthews in its companion Petition for Rehearing (S-66-57), appellants-remonstrants argue that this Court overlooked or misconceived the effect of CR 50.03 in holding that the trial court did not err in overruling appellants-remonstrants' motion for a new trial which was filed in the trial court after this Court issued its mandate in City of Louisville v. Kraft, Ky., 297 S. W. 2d 39. Because this is the identical argument made by the City of St. Matthews in S-66-57, we are setting out here the pertinent portion of our Response to the Petition for Rehearing in that case:

"The clear import of C. R. 50.03(2) is that the motion for a new trial therein provided for applies *only* where the motion for a judgment notwithstanding the verdict has been granted by the *trial court* pursuant to C.R. 50.03(1) prior to an appeal. The language of C.R. 50.03(2) is such that it can have no application to the situation presented in this suit where the motion for judgment notwithstanding the verdict was denied

by the trial court but subsequently granted by the Court of Appeals. We call the Court's attention to the provision of C.R. 50.03(2) which limits the order which may be entered thereunder to a *conditional grant or denial* of the motion for a new trial made by the party whose verdict is set aside. If the intent of C.R. 50.03(2) was to authorize consideration by the trial court of such a motion for new trial, an absurd situation would arise which (1) would permit the trial court to sit as a reviewing court on the judgment directed by the Court of Appeals and (2) would require a second appeal of the case for a review of a *conditional* order entered on the motion for a new trial. Surely this Court would not have inserted the word "conditionally" in C.R. 50.03(2) if the Court had intended to confer a right to file a motion for a new trial in a case of this type. It is obvious that this Court, in adopting C.R. 50.03, intended that the entire case, including all issues therein, be submitted to it for final determination in one bundle, the party against whom the verdict was rendered presenting his arguments in support of his motions for judgment notwithstanding the verdict and for a new trial (if these motions were denied by the trial court pursuant to C.R. 50.03(1)) and the party whose verdict was set aside by the trial court (if such were the case) presenting his arguments in support of his motion for a new trial, if any, which was conditionally granted or denied by the trial court pursuant to C.R. 50.03(2). This interpretation of C.R. 50.03 would permit the trial court and the Court of Appeals to rule on the entire case at one time, thus effectuating the basic premise of the Civil Rules to secure 'the just, speedy and inexpensive determination of every action' (C.R. 1) by eliminating the multitude of appeals and interminable procedural steps which would arise under the construction of the Rule advanced by appellee. Our interpretation of C.R. 50.03(2) is consistent with C.R. 50.02 and 50.03(1) which vest authority in the Court of Appeals to control proceedings subsequent to its decision on the appeal and is also consistent with the construction placed upon this rule by the Civil Code

Committee. The Committee observed (page 165 of Tentative Draft of Rules of Civil Procedure):

> 'Section (1) deals exclusively with the situation where the party against whom a verdict has been entered wishes to question the prior ruling on a motion for directed verdict and also raise other errors by a motion for new trial. This will be the normal case, and *the rule is designed to raise all questions in one appeal.*'
>
> 'Section (2) covers only the unusual situation where the prevailing party wants a new trial, and probably would only arise in cases where the verdict is inadequate. The extra ten days is allowed such a party to relieve him of the burden of second guessing the *lower court's ruling* on his opponent's motion for judgment notwithstanding the verdict.' " (Italics ours.)

Although the facts in this case would not warrant it because of the passage of time and the inapplicability of the facts to various grounds set forth in the rule, perhaps the correct procedural method to be followed in a proper case to seek relief from a judgment entered pursuant to the express directions of this Court is set out in C.R. 60.02. We make this observation purely as a matter of academic interest because (1) appellants-remonstrants did not proceed pursuant to this rule and (2) none of the grounds set forth in the rule support or pertain to the arguments advanced in this case. We believe this to be the intent of that part of this Court's opinion which reads:

> "There was therefore no proceeding pending in which further procedural steps, of the nature asserted by Remonstrants, could be taken."

It strikes us that this language eliminates the argument of remonstrants that the opinion will prevent a litigant justly entitled to relief from obtaining such relief under any state of case.

D. The Court May Direct a Verdict In An Annexation Remonstrance Suit Filed Pursuant to KRS 81.110.

Appellants-remonstrants contend that the Court has no authority to direct a verdict in an annexation remonstrance suit brought pursuant to KRS 81.110. They argue that it is the sole function of the jury to determine the issues presented in such an action. However, we call the Court's attention to KRS 81.110(1) which provides that "the case shall be tried according to the practice prescribed for the trial of jury cases". It has long been the law in this jurisdiction that the Court is authorized to direct a verdict in favor of the defendant where the plaintiffs, having the burden of proof, fail to introduce sufficient evidence to present a jury question. This principle was summarized and restated in clear and unmistakable terms in the very recent case of Wadkins Adm'x. v. Chesapeake & Ohio Railway Company, Ky., 298 S. W. 2d 7 (strangely relied upon by appellants-remonstrants) where, after an excellent presentation of the reasoning behind the rule, the Court said:

> "It may be argued that in passing upon the probative value of the evidence the court is invading the province of the jury. Such argument overlooks the fact that the court has a very definite function to perform even in jury cases. It has long since been settled that the court may examine evidence to determine its sufficiency in law, and the exercise of the inherent power to take the case from the jury by directing a verdict does not violate the constitutional right of a jury trial."

One of the many cases cited as authority for this conclusion is Masonic Widows and Orphans Home and Infirmary v. City of Louisville, 309 Ky. 532, 217 S. W. 2d 815, so severely criticized by appellants-remonstrants.

It is self-evident that, when the appellants herein failed to present sufficient evidence to defeat the annexation

of the proposed territory, the granting of a motion for a directed verdict was eminently proper. It follows that if the trial court under these circumstances failed to direct a verdict, this Court was authorized to overrule the trial court and instruct it to enter a judgment notwithstanding the verdict in favor of the defendant, City of Louisville. This procedure is in perfect harmony and accord with the "practice prescribed for the trial of jury cases."

E. There Is No Merit To the Alleged Defenses To Annexation Again Asserted By Appellants-Remonstrants.

Once again appellants-remonstrants present (rather half-heartedly on this occasion) their arguments on the merits of certain alleged defenses to annexation upon which they contend they have not had their day in court. These are the alleged defenses which, as this Court noted in the Opinion, were set out in the Special Supplemental Complaint (and rejected by the Trial Judge) and Amended Substituted Complaint (and rejected for at least the third time by the trial court). Specifically, these alleged defenses are:

(1) the effect of the adverse vote on the "Mallon Plan" submitted to the voters on November 6, 1956, pursuant to KRS 81.300-81.360;

(2) the area proposed to be annexed was not contiguous to the City of Louisville;

(3) whether the Sinking Fund of the City of Louisville would be permitted to pay certain general obligation school bonds issued many years ago;

(4) whether the decision of this Court in [illegible]monstrance suit on a separate area (Engle v. City of Louisville, 312 Ky. 383, 227 S. W. 2d 407) is a bar to this annexation proceeding;

(5) whether the annexation of this area would require unconstitutional payment of taxes for retirement of general obligation sewer bonds issued by the City of Louisville, and

(6) whether the adverse judgment in the "residential district" of St. Matthews (an entirely separate area) annexation remonstrance suit bars annexation of the area here involved.

We believe it to be our responsibility to make every effort possible to conserve the time which this Court must devote to a single piece of litigation. Accordingly, we will not undertake a discussion of these alleged defenses but will restrict ourselves to references to briefs previously filed with this Court in which each of these defenses is shown to be completely without merit:

(a) Memorandum Brief of Appellee, City of Louisville, in this appeal (S-60-57), pages 7-11;

(b) Supplemental Brief of Appellee, City of Louisville, in this appeal (S-60-57), pages 2-5, 8-12;

(c) Memorandum Brief of Appellant, City of Louisville, in City of Louisville v. City of St. Matthews (S-66-57), pages 14-15;

(d) Supplemental Brief of Appellant, City of Louisville, in City of Louisville v. City of St. Matthews (S-66-57) pages 11-15;

(e) Brief for Appellant, City of Louisville, in City of Louisville v. Kraft (V-46-55), pages 75-81;

(f) Reply Brief for Appellant, City of Louisville, in City of Louisville v. Kraft (V-46-55), pages 13-14.

F. Appellants-Remonstrants Have Not Been Denied Equal Protection of the Law.

Appellants-remonstrants now insist that the opinion of this Court denies them equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States. As best we can determine, their indefinite contentions seem to be based on two grounds:

(1) They have been denied the right to a motion for a new trial pursuant to CR 50.03(2) and to appeal from the order overruling their motion;

(2) The order of this Court in the first appeal directing entry of a judgment notwithstanding the verdict denies them the right to a jury verdict pursuant to KRS 81.110.

We have already shown that CR 50.03(2) does not authorize the filing of a motion for a new trial under the facts of this case and that this Court has authority to direct a verdict and, hence, entry of a judgment notwithstanding the verdict in an annexation remonstrance case brought under KRS 81.110. Therefore, appellants-remonstrants could not have been denied equal protection of the law when the rights they claim were violated do not now and never did exist.

In addition, the Court will note that appellants-remonstrants have not attempted to show wherein they have been treated differently from other members of a class, real or purported. As we read the opinions of this Court in the instant appeal and in City of Louisville v. Kraft, Ky., 297 S. W. 2d 39, this Court has stated (or re-stated) in plain and simple terms what the law is with respect to the functions of the court, jury and legislature in annexation proceedings under KRS 81.110 (in which less than seventy-five percent of the freeholders have remonstrated) and with

respect to procedural steps available to any litigant after this Court directs entry of a judgment notwithstanding the verdict. The principles stated in these opinions have applied and will hereafter apply to any and all litigants similarly situated.

Thus viewed in their proper perspective, it becomes evident that these contentions of appellants-remonstrants are without merit.

IV.

CONCLUSION.

The record in this action demonstrates that appellants-remonstrants have had their day in court, despite their vain protests to the contrary. They are seeking only to prolong this litigation by insisting on still another day in court to resurrect, review and re-argue alleged defenses to annexation which have been held insufficient on a number of occasions. The opinion of this Court now under attack is a correct and fair application of the law of this jurisdiction. We respectfully request this Court to deny the Petition for Rehearing filed by appellants-remonstrants.

Respectfully submitted,

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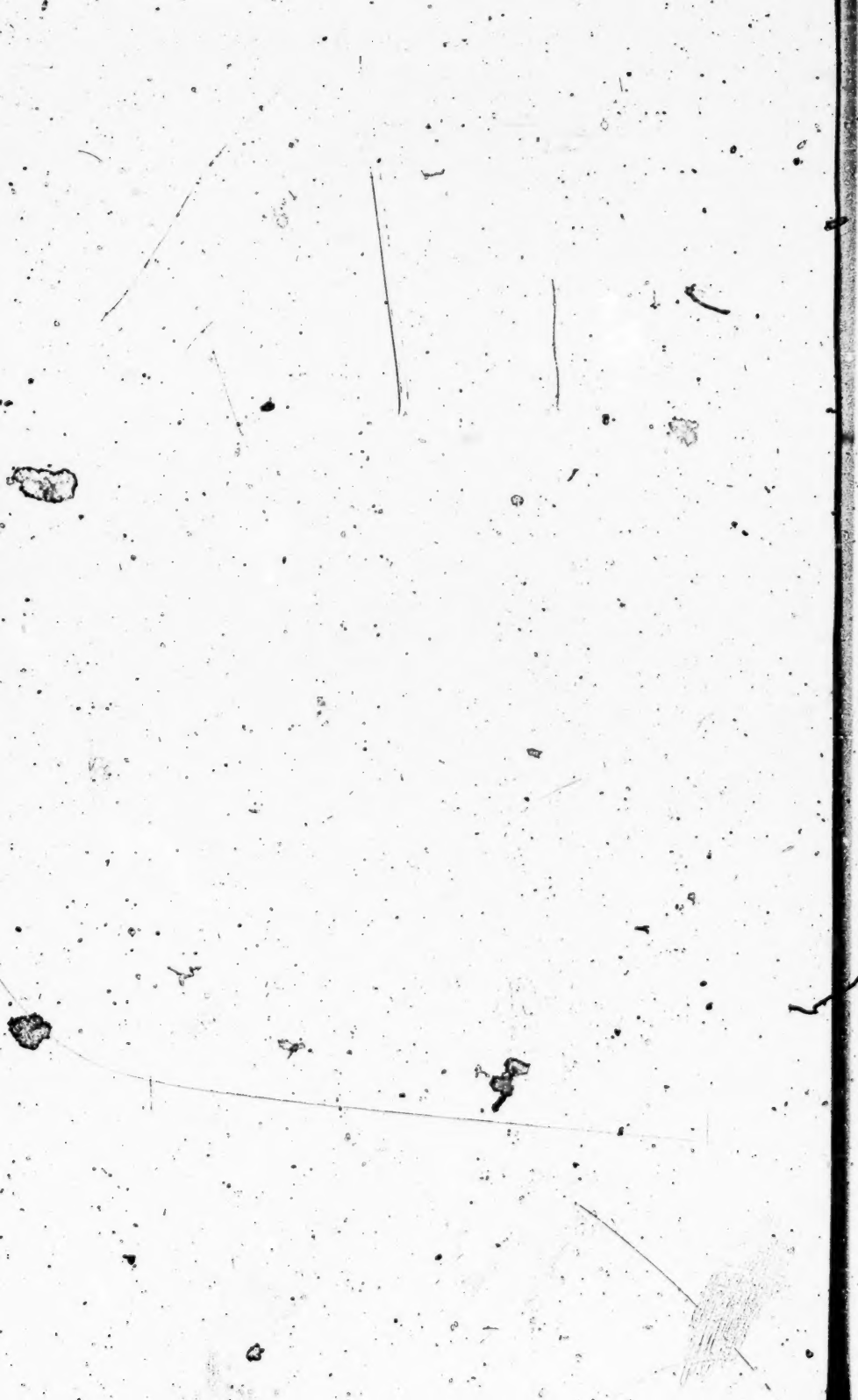

APPENDIX "D"

Companion case, 316 S. W. 2d 210

COURT OF APPEALS OF KENTUCKY

CITY OF LOUISVILLE, A Municipal Corporation, *Appellant*,

v.

CITY OF ST. MATTHEWS, A Municipal Corporation, *Appellee*.

In the City of Louisville v. Kraft, Ky., 297 S. W. 2d 39, the judgment was reversed with directions to enter a judgment authorizing the City of Louisville to annex certain territory identified as the "business district" of St. Matthews. Judgment was accordingly entered on March 8, 1957.

After entry of judgment but prior to the passage of the ordinance annexing the territory, notice of appeal from the judgment was filed in the Jefferson Circuit Court. A supersedeas bond was executed, and supersedeas was issued and served on the Mayor of the City of Louisville to stay proceeding on the judgment. However, the governing body of Louisville proceeded with the annexation and enacted ordinance No. 93. This ordinance annexed the territory described in the judgment entered in the Kraft case on March 8, 1957.

Thereafter, the City of St. Matthews brought this action under the Declaratory Judgment Act seeking to invalidate the proceedings taken by Louisville to annex the subject territory. St. Matthews urged that ordinance No. 93 was void because it was enacted in disobedience of the order of

supersedeas, and that Louisville was precluded by KRS 81.270(2) from proceeding further with the annexation because the voters of St. Matthews on November 6, 1956, rejected a "proposal" for Louisville to extend its boundaries and governmental services under the provisions of KRS 81.300-81.360.

The court upheld St. Matthews' contentions and entered a judgment declaring that:

> "(1) Ordinance No. 93, Series 1957, is void and of no effect; (2) the territory involved herein is a part of the corporate area of St. Matthews; (3) the City of Louisville, its officers, agents and employees, are enjoined for a period of five years from November 6, 1956, from exercising any jurisdiction over any part of the territory involved in this litigation."

To reverse the judgment, Louisville has appealed contending that the circuit court was without jurisdiction to issue the alleged supersedeas and consequently ordinance No. 93 is not void. It is further urged that the instant suit is a collateral attack upon the judgment entered on March 8, 1957, which authorized the subject territory to be annexed by Louisville.

(1) It is our conclusion that Louisville's contentions have merit and that the adjudication of the circuit court was wholly erroneous. First, because the circuit court does not have jurisdiction to grant an order of supersedeas to a judgment entered in accordance with an opinion and mandate of this Court. Drake's Adm'r v. Simonin, 5 Ky. Law Rep. 225; Taylor v. Tibbatts, 13 B. Mon. 177, 52 Ky. [reprint] 141; 83 C.J.S., Supersedeas § 2, p. 892. We accept as sound the statement made by the Supreme Court of Tennessee in Dibrell v. Eastland, 11 Tenn. 507 that "a circuit judge has no power or jurisdiction to grant an order for a supersedeas to the judgments or decrees of this Court, any more than a justice of the county court has

power and jurisdiction to cause to be superseded the decrees and judgments of the circuit court." Consequently, it appears from this record that ordinance No. 93 was legally enacted.

(2, 3) Secondly, this action is, in effect, a collateral attack upon the judgment entered in the Kraft case on March 8, 1957. Inasmuch as the judgment of March 8, 1957 was final, Louisville may annex the territory in question under that judgment, notwithstanding the fact that the voters of St. Matthews rejected the "proposal" for Louisville to extend its boundaries and municipal services under KRS 81.300-81.360. In the circumstances, the trial court should have dismissed the instant action.

The judgment is reversed, with directions to dissolve the injunction and to enter a judgment in accordance with this opinion.